No. 14-144

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IN THE

Supreme Court of the United States

JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, *et al.*,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF RESPONDENTS

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Pursuant to this Court's Rule 37.3, *amicus curiae* Foundation for Individual Rights in Education (FIRE) respectfully files this brief in support of Respondents.[1]

INTEREST OF *AMICUS CURIAE*

Amicus FIRE is a national nonpartisan, 501(c)(3) nonprofit educational and civil liberties organization working to defend and promote individual rights at our nation's colleges and universities. These rights include freedom of speech, legal equality, due process, religious freedom, and sanctity of conscience—the essential qualities of individual liberty and dignity. FIRE believes that, for our nation's institutions of higher education to best prepare students for success in our modern liberal democracy, the law must remain clearly and vigorously on the side of student and faculty rights on campus. During its more than 15 years of existence, FIRE has advocated on behalf of the fundamental liberties of students and faculty on campuses nationwide.

Although the link between specialty license plates and college campuses may not be intuitive, the implications of this case for free expression in academia are potentially enormous. FIRE is concerned that by broadening "government speech" to include messages and images on state-issued specialty license plates, this Court would

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1. The parties have globally consented to the filing of *amicus* briefs in this case and, pursuant to Rule 37.3, letters evidencing such consent have been filed with the Clerk. In accordance with Rule 37.6, *amicus* FIRE hereby states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* contributed monetarily to the preparation or submission of this brief.

inadvertently create another mechanism for censoring student and faculty speech and undermine the role of the public university as "peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

SUMMARY OF ARGUMENT

If the Court reverses the decision of the United States Court of Appeals for the Fifth Circuit and holds that the messages and images that appear on state-issued specialty license plates are government speech, public college administrators nationwide will exploit the ruling as a new opportunity to further restrict protected expression on campus. Should this Court decide that specialty license plates are government speech because state officials are involved in the production process, college and university administrators will soon claim student and faculty expression that involves university procedures is likewise "government speech" that they have the power to control and censor.

Despite this Court's repeated recognition of the crucial importance of free speech on public college campuses, censorship of student and faculty speech is endemic. In FIRE's experience, college administrators often exploit perceived ambiguities in the law in an attempt to justify restrictions on faculty and student speech. Many colleges already wield dubious claims of trademark infringement against students and faculty in order to curtail speech that is controversial or critical of the institution, alleging that such speech will be mistaken for institutional speech—a contention that touches upon the core issue in this case.

In FIRE's experience, university administrators closely monitor impending legal developments that might empower them to enact additional restrictions on student speech. In fact, FIRE is aware that at least one university is awaiting the outcome of this case to support its argument in federal district court that a student organization's T-shirts amount to institutional speech and may thus be censored without violating the First Amendment. In denying the university's motion to dismiss, the judge stated that the university's argument could not provide a legal basis to dismiss the case at present but that the issue was undecided and this case was before the Court.

The impact on campus of this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), demonstrates the negative effect seemingly unrelated First Amendment cases can have on the rights of public college students and faculty. When this Court left open the possibility that its holding in *Garcetti* was applicable to the scholarship and teaching of public university professors, universities immediately began to argue—with success in some circuits—that such speech was unprotected, to the continuing detriment of academic freedom on campus. Absent an explicit holding that the speech of students and faculty on public university campuses is presumptively private speech, a holding for Petitioners would do similar damage to freedom of expression.

Amicus FIRE respectfully submits that this Court should uphold the Fifth Circuit's judgment and deny would-be censors at our nation's public colleges a new means of silencing campus speech. Based on our more than 15 years of experience defending the expressive rights

of college students and faculty, FIRE has no doubt that an ambiguous decision in this case would have a harmful effect on campus discourse. A clear resolution in favor of Respondents would ensure that student and faculty speech remains free as presumptively private expression and thus not subject to administrative review and approval.

In the alternative, FIRE asks this Court to consider the profound impact that an expansion of the government speech doctrine will have on the free speech rights of students and faculty at our nation's public colleges and universities, where free speech—despite its critical importance—is under near-constant attack. If this Court does reverse the Fifth Circuit, it should do so only narrowly and only with a clear statement affirming that public university student and faculty expression remains presumptively private expression.

ARGUMENT

I. A Decision That Specialty License Plates Constitute Government Speech Will Harm Free Speech on Public College Campuses.

The import of this case extends far beyond specialty license plates. Because public college and university administrators routinely seek to censor student and faculty speech, this Court's jurisprudence concerning the boundaries of government speech sharply impacts the First Amendment rights possessed by students and faculty on our nation's public campuses. This Court has repeatedly made clear that the First Amendment's protections do not end at the campus gate—and, indeed, that the First Amendment is of unique value at public

institutions of higher learning. Accordingly, any decision that expands the range of speech under governmental control should make an explicit exception for the freedom of expression and academic freedom rights possessed by students and faculty members at public universities.

A. Although Freedom of Expression Is of Particular Importance on Public College and University Campuses, Censorship There Is Endemic.

This Court has long emphasized and understood the importance of free and open expression on our nation's public campuses, proclaiming more than a half-century ago that the "essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In the nearly sixty years since *Sweezy*, this Court and lower courts have repeatedly reaffirmed the particular significance of the First Amendment in the public university setting.[2]

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2. *See, e.g., Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"); *McCauley v. Univ. of the V.I.*, 618 F.3d 232, 243 (3d Cir. 2010) ("The university atmosphere of speculation, experiment, and creation is essential to the quality of higher education. Our public universities require great latitude in expression and inquiry to flourish."); *Kincaid v. Gibson*, 236 F.3d 342, 352 (6th Cir. 2001) ("The university environment is the quintessential 'marketplace of ideas,' which merits full, or indeed heightened, First Amendment protection.").

In *Healy v. James*, 408 U.S. 169 (1972), for example, this Court made clear that

> the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Healy, 408 U.S. at 180 (internal citations omitted). *See also Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995) (noting that when regulating speech on campus, "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition").

But despite repeated affirmation of the critical necessity of free speech on campus by this Court and lower courts, the majority of public colleges nationwide maintain "speech codes"—restrictions on student and faculty speech that heavily regulate or prohibit speech protected by the First Amendment.[3] Public university

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3. FIRE surveyed 437 colleges and universities in 2014 and found that more than 55 percent maintain policies that clearly and substantially prohibit protected speech. In 2014, FIRE launched an aggressive campaign to support students and faculty who want to challenge these rules in court. There is no shortage of potential cases: In the campaign's first year, seven cases were filed—four on the same day. Jennifer Medina, *Advocacy Group Sues 4 Universities in Challenge to Policies It Says Curb Free Speech*, N.Y. TIMES, July 1, 2014, at A18.

administrators all too often use these speech codes to limit or prohibit student speech they deem offensive or find politically inconvenient.[4] Also, unfortunately, FIRE's years of experience defending expressive rights on campus demonstrate that administrators will seize upon any remotely related legal justification to limit controversial, dissenting, or merely inconvenient discourse.

B. Public Colleges Routinely Attempt to Establish Policies and Procedures Under Which They Can Censor Student or Faculty Speech.

Colleges and universities frequently establish policies and procedures based on distortions of existing legal doctrines to silence speech. For example, this Court has allowed government actors to enact "reasonable," "narrowly tailored" time, place, and manner regulations on speech on government property. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Countless universities have erroneously cited this carefully prescribed allowance to justify policies that both require students to navigate cumbersome administrative procedures to obtain permission to express their views on campus and quarantine students' expressive activities to small and/or remote areas of campus.[5] The University

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4. For extensive examples of such abuses of power, *see* GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE (2012).

5. *See Infographic: Free Speech Zones on America's Campuses*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Sept. 19, 2013), http://www.thefire.org/wp-content/uploads/2014/03/Free-speech-zone-infographic-pdf.pdf (surveying more than 400 universities and finding that approximately 1 in 6 maintained a

of Cincinnati, for example, maintained a policy limiting expressive activities to a "free speech zone" comprising less than 0.1 percent of the university's campus and requiring 10 days' prior approval even for expressive activities in that zone. The university vigorously defended that policy against criticism until, in 2012, the U.S. District Court for the Southern District of Ohio ruled that the policy "violates the First Amendment and cannot stand." *Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams*, No. 12-cv-155, 2012 U.S. Dist. LEXIS 80967, at *2 (S.D. Ohio June 12, 2012).

Although trademark licensing is seemingly unrelated to censorship, public colleges and universities similarly attempt to regulate student or faculty speech by asserting untenably broad control over campus expression that references the institution's name or trademarks.[6]

"free speech zone" policy). *See also Burch v. Univ. of Haw. Sys.*, No. 14-cv-00200 (D. Haw.) (free speech zone policy revised in settlement agreement); *Sinapi-Riddle v. Citrus Comm. Coll. Dist.*, No. 14-CV-05104 (C.D. Cal.) (same); *Van Tuinen v. Yosemite Comm. Coll. Dist.*, No. 13-CV-01630 (E.D. Cal.) (same)

6. *See, e.g., Adam Kissel, Berkeley Claims Control of the Word 'California' But Permits Student Group to Use It*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (May 3, 2010), http://tinyurl.com/Berkeley-Claims-Control (describing the University of California, Berkeley's prohibition on use of "California," "Cal," and "Berkeley" in student organization names without prior permission); *Free Speech Chilled at Santa Rosa Junior College: Administration Threatens Those Who Use Its Initials in Private E-mail Addresses and Domain Names*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (July 20, 2009), http://tinyurl.com/Santa-Rosa-Junior-College (describing Santa Rosa Junior College's ongoing ban of the college's name or initials in private email addresses or domain

Universities often grant use of their marks to student groups funded by activity fees and operating under the institution's auspices and supervision within the framework of student life programs.[7] Similar to regimes governing the authorization of specialty license plates, public colleges and universities often require students to gain approval before engaging in certain forms of expression that include the institution's marks—which can include not only mascots or logos, but the name of the institution itself.

Although they have the right to license their marks, colleges and universities routinely stretch that authority to control the students' message by claiming that the use of the trademark could be misinterpreted as the institution's support for the students' views. The fear that the message of an independent group could be misconstrued as institutional speech is dubious in light of this Court's precedents.[8] *See Rosenberger v. Rector*

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names). *See also St. Louis Univ. v. Meyer*, 625 F. Supp. 2d 827 (E.D. Mo. 2008) (adjudicating university's trademark suit against professor for incorporating a nonprofit corporation bearing the name and caption of the student newspaper in anticipation of its becoming an independent entity).

7. *See, e.g.*, Trademark Licensing: Student Groups, W. VA. UNIV., http://trademarklicensing.ur.wvu.edu/student-groups (last visited Feb. 12, 2015) ("Student organizations are permitted to use the WVU trademarks as approved by the WVU Office of Trademark Licensing to promote their student organization through student organization websites, on licensed apparel, in advertising, etc.").

8. Luke Darby, *Chancellor of Patrick Henry College Withdraws Short-Lived Threat to Sue Student-Run Gay Blog*, N.Y. MAG. DAILY INTELLIGENCER (Dec. 3, 2012), http://nymag.

and Visitors of the Univ. of Va., 515 U.S. 819, 834 (1995) (stating that "the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers [including students]"); *see also Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000). Nevertheless, FIRE knows of at least two cases currently pending in federal courts in which universities are justifying censorship on precisely that ground. For example, in a case currently being litigated in the Northern District of Illinois, Chicago State University (CSU) alleged trademark infringement in an attempt to shut down a faculty-authored blog that exposed mismanagement by the president and other senior administrators. CSU's General Counsel sent the faculty members a cease-and-desist letter claiming that the blog's masthead, which features a photo of three bushes trimmed into the shape of a C, S, and U, violated the university's

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com/daily/intelligencer/2012/12/patrick-henry-gay-queer-farris.html (describing Patrick Henry College's threat of a trademark infringement lawsuit against the student-run "Queer Patrick Henry College" blog, and the demand that any further discussion of LGBT issues be conducted "without using the term 'Patrick Henry College' in any manner"); *Online Speech Threatened at UCLA and Santa Rosa Junior College*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Aug. 20, 2009), http://tinyurl.com/Online-Speech-Threatened-UCLA (describing the University of California, Los Angeles' demand that a student take down a blog critical of the university based on claims of trademark infringement due to the use of the initials "UCLA" in its web address); *Victory for Free Speech at UC Santa Barbara*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Feb. 4, 2005), http://tinyurl.com/Free-Speech-UC-Santa-Barbara (detailing University of California, Santa Barbara's demand that a student take down a blog critical of the university due to its use of the initials "UCSB" in its web address).

trademark. *Beverly v. Watson*, No. 14-cv-04970 (N.D. Ill., filed July 1, 2014). Although the blog sharply criticizes CSU, the university claimed that the faculty use of the university's name or logo could be seen as university speech or as an endorsement of the message.[9] In addition, Iowa State University censored student organization T-shirts advocating marijuana legalization through its trademark policies, resulting in a First Amendment lawsuit currently pending in the Southern District of Iowa, described in detail on pages 14-15 of this brief. *Gerlich v. Leath*, No. 14-00264 (S.D. Iowa, filed July 1, 2014).

Thus, there is a strong parallel between the approval system used by universities and the specialty license plate approval system at issue in this case. Just as Petitioners argue that the "content and design of state-issued license plates" should be under State control, Pet'rs' Opening Br. at 13, so too do public college administrators routinely claim that student and faculty expression involving university marks or the institution's name should be subject to governmental approval. Just as Petitioners here claim the right to disassociate themselves from any message related to the Confederate battle flag on state license plates, Pet'rs' Opening Br. at 25–27, college administrators have attempted to justify banning controversial messages by asserting the right to control their name and marks.

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9. *See* Letter from Ari Cohn to Chicago State University President Wayne D. Watson, Mar. 4, 2014, *available at* http://www.thefire.org/fire-letter-to-chicago-state-university (describing Chicago State University's attempt to shut down a faculty blog critical of the administration based on claims of trademark infringement for its use of the initials "CSU" and a picture of a campus landmark, as well as alleged violations of university civility policies).

The majority of the courts below have crafted a rule for determining if specialty plates should be considered government speech or not: whether a reasonable person would be able to correctly identify the speaker as the government or a private party. *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *see also Choose Life of Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008). This rule would fit well into the academic context. Just as a reasonable person would not mistake the dozens of messages sponsored by independent organizations on license plates for government speech, it is unlikely that a person seeing a student wearing a T-shirt advertising his or her college's chapter of the College Democrats or the College Republicans would mistake it as a message from the university.[10]

If this Court were to reverse the Fifth Circuit, however, the result would be a blow to free expression

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10. This Court has drawn a clear distinction between private speech and institutional government speech in previous holdings concerning public universities. In *Southworth*, this Court found that a public college's administration of student activity fee funding "does not raise the issue of . . . the state-controlled University's right, to use its own funds to advance a particular message" because "[t]he University of Wisconsin exacts the fee at issue for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students." 529 U.S. at 229. Likewise, in *Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981), this Court observed that "by creating a forum," a public university "does not thereby endorse or promote any of the particular ideas aired there." But despite its clarity, this Court's precedent has not deterred administrators from asserting that private student or faculty speech is government speech.

on campus. By holding that messages created through a government approval process are government speech, this Court would create a vehicle for public university administrators to suppress controversial messages, claiming their control over the institution's trademarks is analogous to state license plate approval and thus gives them the right to censor any message that they do not like.

In sum, FIRE has seen a wide range of legal doctrines used to suppress speech on campus—and thus we have every reason to believe that a decision declaring specialty license plates to be government speech would be likewise used to stifle expression.

C. Universities Monitor and Exploit Legal Developments That Could Justify Greater Censorship on Campus.

In FIRE's experience, university administrators monitor legal developments that might empower them to place additional limitations on student and faculty speech. For example, on June 20, 2005, the Seventh Circuit issued an opinion applying the framework from this Court's analysis in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), allowing a high school principal to exert editorial control over a student newspaper, to a collegiate student newspaper. *Hosty v. Carter*, 412 F. 3d 731 (7th Cir. 2005). Just ten days later, the general counsel of the California State University System issued a memorandum noting the decision's potential impact on CSU institutions:

> [T]he case appears to signal that CSU campuses may have more latitude than previously believed

> to censor the content of subsidized student newspapers . . .[11]

Similarly, just one month after this Court issued its decision in *Morse v. Frederick*, 551 U.S. 393 (2007), Temple University relied heavily on that decision to argue for the constitutionality of its sexual harassment policy in an appeal to the Third Circuit. Temple's brief argued that "[a]t the time the district court made its ruling, it did not have the benefit of the *Morse* opinion in which the Supreme Court provided lower courts with guidance on how to analyze school policies that purportedly regulate student conduct."[12] Thus the university seized upon a high school case involving a nonsensical phrase—"BONG HiTS 4 JESUS"—that may have advocated illegal drug use to justify an overly broad and vague sexual harassment policy designed to regulate the speech of adult college students.

Indeed, FIRE is aware that at least one university is watching this specific case with an eye towards its impact on the institution's ability to limit students' free speech rights on campus. With *amicus* FIRE's support, two students from the Iowa State University (ISU) chapter of the National Organization for the Reform of Marijuana Laws (NORML) sued ISU for violating their First Amendment rights by refusing to approve

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11. Evan Mayor, *Memo linking California with* Hosty *decision worries students*, Student Press Law Ctr. (Sept. 15, 2005, 12:00 AM), http://www.splc.org/article/2005/09/memo-linking-california-with-hosty-decision-worries-students.

12. Brief of Appellant at 36, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

T-shirt designs that featured a cannabis leaf—although the university had no such scruples when it allowed the student BDSM group "Cuffs" to use the ISU initials. *Gerlich v. Leath*, No. 14-00264 (S.D. Iowa, filed July 1, 2014). ISU moved to dismiss the case, arguing in part that the T-shirts constituted government speech because the group's name—NORML ISU—referenced the university and was included in the design. (Per university policy, recognized student organizations like NORML ISU are required to include "ISU" in their name.) In denying the motion to dismiss, the judge stated that ISU's argument that the T-shirt design was government speech could not provide a legal basis to dismiss the case at this time. However, there was extensive discussion of the analogy of specialty license plate cases during the hearing on the motion, and the judge's order implied that the outcome of the *Confederate Veterans* case could be relevant in later stages of the case. Order Den. Mot. to Dismiss, *Gerlich v. Leath*, No. 4:14-cv-00264–JEG at n.3 (S.D. Iowa Jan. 6, 2015), ECF No. 26.

II. Even If This Court Does Reverse the Fifth Circuit, It Should Make Clear That Student and Faculty Expression on Public College and University Campuses Is Presumptively Private Speech.

If this Court does reverse the Fifth Circuit, it should do so only in a way that draws the boundaries of the government speech doctrine narrowly, and it should recognize the impact of its holding on campus discourse by explicitly clarifying that the speech of students and faculty at public colleges and universities remains presumptively private speech.

The need for such clarification is illustrated by the continuing uncertainty over the applicability of this Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to the speech of faculty at public colleges and universities, and the attendant negative impact on academic freedom.[13] Since this Court explicitly declined to decide whether its *Garcetti* analysis "would apply in the same manner to a case involving speech related to scholarship or teaching," the decision has created considerable confusion at universities and in the lower courts.[14]

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13. *See generally* Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J. 677 (2014); Hilary Habib, Note, *Academic Freedom and the First Amendment in the Garcetti Era*, 22 S. CAL. INTERDIS. L.J. 509 (2013); Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-Garcetti World*, 37 SEATTLE U. L. REV. 1 (2013); Suzanne R. Houle, *Is Academic Freedom in Modern America on Its Last Legs After Garcetti v. Ceballos?*, 40 CAP. U.L. REV. 265 (2012); Carol N. Tran, Comment, *Recognizing an Academic Freedom Exception to the Garcetti Limitation on the First Amendment Right to Free Speech*, 45 AKRON L. REV. 945 (2012).

14. *See Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014) ("*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (declining to apply *Garcetti* to academic speech submitted as part of a professor's application for a full tenure professorship). *But see Savage v. Gee*, 665 F.3d 732, 739 (6th Cir. 2012) (expressing skepticism of any exception to *Garcetti* for academic speech); *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (dismissing the First Amendment claims of a professor who complained of difficulties in administering a grant, because "the proper administration of an educational grant fell within the scope of Renken's teaching duties").

Not surprisingly, universities frequently ask courts to apply *Garcetti* to faculty speech and expression. In *Adams v. Trustees of the University of North Carolina-Wilmington*, the university defendants argued, on a motion for summary judgment, that *Garcetti* precluded a public university professor's First Amendment claim that the university had retaliated against him for his outspoken conservative, Christian writings. The university, noting "the majority [of this Court] refused to exclude university faculty from the scope of *Garcetti*," argued that *Garcetti* "bars plaintiff's First Amendment claims." Mem. in Supp. of Mot. for Summ. J. for Defs. at 26, *Adams v. Trs. of the Univ. of N.C.-Wilmington*, No. 07-CV-64-H (E.D.N.C. May 1, 2009), ECF No. 132.[15]

Similarly, in 2008, Professor Loretta Capeheart brought a First Amendment retaliation claim against officials at Northeastern Illinois University, arguing that the university took adverse action against her because of her advocacy on behalf of students arrested at a political protest as well as her comments about the low number of Latino faculty at the university. The university argued that under *Garcetti*, the First Amendment did not protect Capeheart's expression. Mem. in Supp. of Mot. for Summ. J. for Defs. at 8, *Capeheart v. Hahs et al.*, No. 08-cv-1423 (N.D. Ill. Sept. 8, 2010), ECF No. 136.

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15. While the district court agreed with the university's argument, the United States Court of Appeals for the Fourth Circuit rejected it on appeal. *Adams*, 640 F.3d at 564 (observing that "[a]pplying *Garcetti* to the academic work of a public university faculty member under the facts of this case could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment").

Just as this uncertainty continues to inhibit the creation of knowledge and free exchange of ideas on college campuses across the country, a reversal of the Fifth Circuit's decision without a clarification that the speech of student organizations (and other students and faculty) is not government speech will almost inevitably be used by universities to stifle freedom of expression on campus.

CONCLUSION

For the foregoing reasons, as well as those set forth in Respondents' briefs, the Fifth Circuit's judgment should be upheld.

Respectfully submitted,

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